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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA; CENTRAL ARIZONA IRRIGATION AND DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA; NEW MAGMA IRRIGATION AND DRAINAGE DISTRICT, A MUNICIPAL CORPORATION OF THE STATE OF ARIZONA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO CERTIORARI

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1. In their Petition, the three Arizona irrigation districts showed that certiorari should be granted because this case involves issues of great significance concerning the Secretary of the Interior's allocation authority under the Boulder Canyon Project Act of 1928 ("BCPA"). The court of appeals held that the Secretary, exercising his authority under § 5 of the BCPA in accordance with the direction provided in the San Carlos Apache Tribe Water Rights Settlement Act ("SCAT Act"), was free to allocate to the San Carlos Apache

a significant quantity of water that he had previously allocated "to the Central Arizona Project" ("CAP") as directed in the Ak-Chin Settlement Act of 1984. This water, allocated to the CAP and thus already subject to the CAP's allocation and contractual structure, was explicitly subjected to the Districts' contracts in a subsequent amendment to the Secretary's Master Repayment Contract with the Central Arizona Water Conservation District ("CAWCD") in 1988. See Pet. at 2-13, 1a-21a, 57a, 94a. The Districts thus showed in their petition that the court of appeals' decision enables the Secretary to resolve the numerous water rights disputes currently brewing in the West with water currently allocated to and contracted for by others, and thereby casts into jeopardy the value of the hundreds of existing water supply and delivery contracts to which the Secretary is party. See Pet. at 14-21.

The Districts further showed that the court of appeals applied the "unmistakability doctrine" in denying their contractual claims to the water at issue here in a manner that directly conflicts with this Court's decision in *United States v. Winstar*, 518 U.S. 839 (1996), and creates a harmful precedent with far reaching implications for western water law, if not government contract law generally. See Pet. at 26-29.

The importance of this case is underscored by the brief in support of certiorari filed by the *amicus*, a California association of local government agencies and public utilities who are concerned about the impact of the court of appeals' decision on their own contracts with the Secretary.

The government's brief in opposition does not try to refute the Districts' showings on these issues. With respect to the impact on the Secretary's allocation authority and Western water contracts generally, the government simply denies -- in

a single, unsupported sentence -- that this case will have any "broad implications." Opp. at 7. As discussed in the Districts' petition, however, even if the impact of the dispute were "confined to the excess Ak-Chin water reallocated in the SCAT Act," as the government contends, Opp. at 7, it would nevertheless be a matter worthy of this Court's attention: the reallocation of the excess Ak-Chin water deprived all non-Indian users of water from the CAP -- the principal source of reclamation and development in Central Arizona -- of 23,000-33,000 acre feet of water in most years, thereby directly or indirectly impacting hundreds of thousands of people. And, given the court of appeals' broad statements regarding the Secretary's allocation authority, the decision will inevitably have a far broader impact than that. See Pet. at 14-21.

With respect to the conflict with *Winstar*, the government simply asserts that "no *Winstar* issue is properly presented here," because "the court of appeals needed to rely only on . . . ordinary [legal] principles" in its decision. Opp. at 12. This, of course, is precisely the point: under *Winstar*, the court of appeals *should have* relied "only on . . . ordinary principles," under which the district court held that the Districts' contracts indeed afford them the rights they assert in this case. It was the court of appeals' decision to apply instead an "unmistakability" analysis to these ordinary contract claims that contributed to its erroneous decision, caused the conflict with *Winstar*, and created the precedent the Districts ask this Court to correct.[1]

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[1]The government suggests that the *Winstar* issue is not reviewable because the Districts did not cite that case in their briefs to the court of appeals. This is hardly surprising, as the Districts do not believe the "unmistakability doctrine" is applicable to their contracts, and the government never suggested otherwise. The district court, of course, did not apply the doctrine, nor was it apparent from its initial opinion, from which the Districts sought rehearing, that the court of appeals had applied it.

As set forth in the Districts' petition, then, this case is deserving of this Court's attention.

2. Rather than addressing the importance of the issues presented by this case, the government attempts to convince this Court that the Districts' petition should be denied because the court of appeals "correctly" reversed the district court. Opp. at 7-11. In this regard, the government principally contends that the Districts can have no enduring right to the water at issue here because of the word "interim" in the Ak-Chin Settlement Act. The government's interpretation of "interim," however, ignores the Secretary's use of that term, the legislative history of the Ak-Chin Settlement Act, and the contractual provisions implementing that Act. Secondarily, the government asserts that even if the water relinquished by the Ak-Chin in the Ak-Chin Settlement Act were irrevocably committed to the CAP, the Districts would not be entitled to that water. Both of these arguments are without merit as demonstrated below.

a. First, contrary to the government's assertions, and as the district court in this case recognized, the language of the Ak-Chin Settlement Act indeed committed the Secretary to allocate to the CAP any of the original Ak-Chin allocation not needed for delivery to the Ak-Chin in any given year. Thus, the Act provides: "*[W]henever* the aggregate water supply referred to in subsection (f) exceeds the quantity necessary to meet the obligations of the Secretary under this Act, the Secretary *shall allocate* [any excess water] on an interim basis to the Central Arizona Project." Pet. at 57a (emphasis added). In other words, in any (and every) year in which the water referenced in subsection (f) exceeds the 75,000-85,000

Rather, the "unmistakability doctrine" and the *Winstar* conflict appeared for the first time at the Ninth Circuit's initiative, in its October 14, 1998 decision.

acre-feet to which the Ak-Chin are entitled, the Secretary must make that excess water available to the CAP.

These allocations, however, would be on "an interim basis." That is, simply because a given quantity is available and allocated in one year does not mean that an equal quantity of water -- or indeed any water -- will be available and allocated the next year. As the Districts explained in their petition, the term "interim" is used in the context of western water allocations and water rights in just this sense, to reflect the contingent nature of these rights. Pet. at 25 n.18.[2] The Secretary himself repeatedly used the term in precisely that fashion in his 1983 Allocation Decision: the Secretary "will retain the right to contract for water sales on an interim basis where Indian water allottees are not utilizing the full CAP allotment as provided herein." See Pet. at 64a, 71a-72a, 72a. The Secretary then exercised this retained authority by contracting with the Districts and other non-Indian agricultural users to provide to them -- on an interim basis -- any of the Indian or municipal and industrial allocations not actually used by those allottees in a particular year. See Pet. at 80a ("Non-Indian agricultural water users are expected to contract for and receive water available from the CAP facilities which is not being utilized in the early years by the M&I and Indian contractors."); Pet. at 88a-91a, 94a-95a.[3]

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[2]The principle inherent in the term reflects the linchpin of western "prior appropriation" water allocation systems, under which a water user with rights junior to other users from the same source has a protected right to use senior unused water on an interim, nonpermanent basis if it is not being put to use by the senior users.

[3]Contrary to the government's suggestion, see Opp. at 3, 11, there is no "Indian pool" of water: the CAP water is available to each specific Tribe and municipal and industrial user in accordance with the Secretary's allocations, with all unused water annually available to the non-Indian agricultural pool. Pet. at 80a, 88a-91a, 94a-95a.

That the word "interim" is used in this same sense in the Ak-Chin Settlement Act is confirmed by the legislative history of the provision. According to Senator DeConcini, the drafter and sponsor of the relevant provision, the "amendment clarifies . . . that any water that is not utilized by the Ak-Chin community will revert to the State for use by its CAP customers." 130 Cong. Rec. S26714 (daily ed. Sept. 25, 1984) (see Pet. at 22 & n.15). There is no suggestion that Senator DeConcini intended the Secretary's allocation to the CAP to be temporary or revocable. Rather, without the word "interim," the Ak-Chin Settlement Act would be ambiguous, and could be interpreted to mean that at such time as ("whenever") a quantity of the original Ak-Chin allocation became available, it would have to be permanently allocated to the CAP, regardless of whether it was needed in some later year to satisfy the Ak-Chin's entitlement. This, of course, is not what Congress intended. In the language used by the Secretary himself in the 1983 CAP Allocation Decision, then, Congress specified that allocations of excess Ak-Chin water to the CAP would occur on an "interim" basis.

In addition, of course, even if the Ak-Chin Settlement Act of 1984 had left the Secretary free to permanently remove the excess Ak-Chin water from the CAP, in 1988 the Secretary amended the Master Repayment Contract with the CAWCD to explicitly include the excess Ak-Chin water among the "project water" required to be delivered to Arizona non-Indian users. Pet. at 94a ("'Project Water' shall mean . . . (d) any additional water . . . that is required to be delivered by the Secretary through the project, pursuant to the Ak-Chin Water Rights Settlement Act . . . ."). This contractual provision, which the government simply ignores in its opposition, removes any doubt there may have been regarding the permanency of the Districts' right to receive the water, on an

"interim" basis, in any year it is not needed for delivery to a higher priority user. Pet. at 94a.[4]

b. The government next briefly contends that even if the Ak-Chin Settlement Act irrevocably committed the excess Ak-Chin water to the CAP, "[n]either the 1983 allocation decision nor the 1983 contracts compelled the Secretary to allocate a fixed share of the . . . water to petitioners." Opp. at 10. This assertion crumbles in the face of the relevant context and facts.

First, in 1983, the Secretary fully allocated all of the water in the general CAP pool -- *i.e.* "Arizona's remaining entitlement to Colorado River water [under the BCPA]" that had not already been developed through previously-constructed facilities. Pet. at 61a. Against this background alone, the Ak-Chin Settlement Act's identification of "the Central Arizona Project" as the intended recipient of the excess Ak-Chin water logically refers to the comprehensive allocation scheme that the Secretary had devised just one year earlier. This interpretation is confirmed by the legislative history of the Act, which makes clear that the relevant provision was specifically drafted by the Arizona Senators to

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[4]As a predicate for its argument regarding the interpretation of the Ak-Chin Settlement Act, the government also repeats its mantra that the Yuma-Mesa water committed to the Ak-Chin in the Ak-Chin Settlement Act "has always been separate from the CAP," and that thus the "reallocation of the excess Ak-Chin water . . . did not make petitioners worse off" than they were when they entered into their 1983 contracts. Opp. at 8. As the record demonstrates, however, whether or not the Yuma-Mesa water was part of the CAP and subject to the Secretary's 1983 Allocation Decision and implementing contracts was a hotly contested issue, which the relevant provision of the Ak-Chin Settlement Act was specifically designed to settle. See Pet. at 7-9. The government's refusal to acknowledge that irrefutable fact or its significance to the proper interpretation of the Ak-Chin Settlement Act renders its argument unsustainable.

resolve the dispute concerning the non-Indian users' entitlement to the Yuma-Mesa water that Congress proposed to commit to the Ak-Chin. See Pet. at 7-9, 21-23. Finally, as late as 1990, in congressional testimony concerning a proposed settlement of the Fort McDowell Indian Tribe's water claims, the Department of the Interior's witness acknowledged that to use the excess Ak-Chin water in settlement of these claims would require amendment of the Ak-Chin Settlement Act. See Pet. at 9. Amendment, of course, would not have been necessary had the Ak-Chin Act itself not subjected the water to the Districts' and other non-Indian CAP users' contracts.

If this cumulative history were not enough to establish beyond peradventure that the excess Ak-Chin water, allocated to the CAP, was subject to the Districts' contracts, there remains the additional fact that as stated above the Secretary amended his Master Repayment Contract with the CAWCD in 1988 to explicitly provide that the excess Ak-Chin water was "project water" subject to the non-Indian users' pre-existing contracts, including the Districts'. Here again, the government's brief simply omits this fact. This amendment, however, both confirms the correct interpretation of the Ak-Chin Settlement Act itself, and independently precludes the government's reallocation of the excess Ak-Chin water to the San Carlos Apache.

CONCLUSION

The government's opposition sidesteps the significance of this case, focussing instead on an effort to convince this Court to deny the petition because the court of appeals' decision was correct on its merits. As shown above, however, the government's arguments in this regard are demonstrably false. For the reasons set forth in the Districts' petition, a writ of certiorari should issue.

Respectfully submitted,

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